2000

State of Utah v. Charles Wallace : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff and Appellee,	)	
	)	Appellate Case No. 20000543-CA
v.	)	
	)	Priority No. 2
CHARLES WALLACE,	)	
	)	
Defendant and Appellant.	)	

REPLY OF THE APPELLANT

Appeal from the Judgment and Order of Commitment
Eighth District Court, Manila Department
Daggett County, State of Utah
Honorable A. Lynn Payne, Judge

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Table of Contents

Table of Authorities

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff and Appellee, v. CHARLES WALLACE. Defendant and Appellant.	)))))))))	Appellate Case No. 20000543-CA Priority No. 2

REPLY OF THE APPELLANT

Argument

I. The offense of driving with any measurable controlled substance in the body is not necessarily included in the offense of driving under the influence, despite the State's claim.

In this issue of first impression, Wallace agrees with the State that the pivotal question is whether the second element of the driving with any measurable controlled substance in the body statute (DWM) is necessarily included within the second element of the driving under the influence statute (DUI). Br. Appellee 17. The two elements are:

> [A person may not operate ... a vehicle ... if the person has] "any measurable controlled substance or metabolite of a controlled substance in the ... body,"

Utah Code Ann. 41-6-44.6 (1997), and

> [A person may not operate ... a vehicle ...] "under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle,"

Utah Code Ann. 41-6-44(2)(a)(ii) (1997).

The State argues first that once a person takes drugs and the drugs become measurable in the body, as described in section 41-6-44.6, then that person is under the influence of drugs within the meaning of section 41-6-44. "Thus a driver who has a controlled substance or a metabolite of a controlled substance in his body (the second element of a DWM), is necessarily under the influence of that drug (the second element of a DUI)." Br. Appellee 18. This argument, however, makes no sense medically or legally. The phrase "under the influence" cannot be read in isolation, apart from what follows.[1] Having a detectable drug in the body is not one and the same thing as being under the influence of the drug, where "under the influence" is expressly defined as the incapacity to safely operate a vehicle. Indeed, some drugs, including controlled substances and their metabolites, produce no perceptible change in human functioning or

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[1]The State incorrectly claims that there are three elements in the DUI statute. Element two is "is under the influence of ... any drug," and element three is "[T]o the degree that renders [him] incapable of safely operating a vehicle." *See* Br. Appellee 16.

have very limited effects such as temporary pain relief. They do not render a person impaired and unable to drive safely. The shot of novocaine that we receive in the dentist's office is one example. That drug does not prevent us from driving home unassisted and in a normal manner after our dental work is completed. Our driving is not impaired either by the painkiller that we may take for a day or two after visiting the dentist. Many believe, similarly, that moderate consumption of alcohol does not render an individual incapable of driving safely. That is why, in section 41-6-44, driving under the influence is not defined as having a blood or breath alcohol concentration of any amount whatsoever but rather .08 grams or greater.

The DUI statute is not concerned with whether a person is "under the influence" in some broad definitional sense, as the State proposes, simply because the person has taken a drug or consumed alcohol. Rather, the statute is meant to deal with the societal problem of people driving when they are impaired due to drugs or alcohol. The DWM statute, on the other hand, does not make such a distinction. A person may be driving completely safely. Nonetheless, if he or she has any measurable amount of a controlled substance in the body, and the controlled substance was taken illicitly, a violation of section 41-6-44.6 occurs. For this reason, the elements of the DUI and DWM statutes are different. In one, drug use rises to the level of a criminal offense only if a person is rendered incapable of safely operating a vehicle. In the other, illicit drug use prior to driving is an offense *per se*. Because the statutory elements are not identical, driving

with any measurable controlled substance in the body cannot be a necessarily included offense of driving under the influence.

Secondly, the State argues that language in section 41-6-44.6, specifically "[i]n cases not amounting to a violation of Section 41-6-44," signifies that DWM is a lesser included offense of DUI. Br. Appellee 18-19. This is, however, a novel reading of the language in the statute. The State presents no authority or other support for its interpretation. A better reading, and one actually supported by case law in this jurisdiction, is that DWM and DUI are totally separate offenses that the State could have charged Wallace with in the alternative.

In *State v. Montoya*, 910 P.2d 441 (Utah Ct. App. 1996), defendant appealed the fact that he was charged in the same information with aggravated sexual assault and incest, involving his adult daughter. He claimed that the charges were mutually exclusive. This Court, however, held that the crimes of aggravated sexual assault and incest are not repugnant and can be charged alternatively. *Id.* at 446. The Court considered language that had been added to the incest statute, namely "under circumstances not amounting to rape, rape of a child or aggravated sexual assault." "The primary purpose of the ... language," the Court said, "was likely to encourage criminal punishment under those greater crimes when the evidence in a particular case warrants it." *Id.* at 445. In other words, as a prosecutorial principle, defendants ideally should be convicted of the greatest crime that the evidence in a case warrants. Charging defendants

in the alternative sometimes furthers this particular goal of the state.

Had Wallace been charged with DUI and DWM in the alternative, the issue that he now presents on appeal would not have arisen. Wallace understands and does not dispute that the State could have charged him alternatively. But the State did not choose to do so. Instead, it sought a lesser included instruction from the trial court in the middle of trial, at a point, in fact, where defense counsel rightly voiced concerns about due process. T. 305. Undoubtedly prompting the State's action was a realization that the evidence presented at trial did not support Wallace's conviction on the charge of driving under the influence.

Significantly, charging in the alternative and seeking a lesser included instruction involve different operations of the law and different legal strategies. Charging in the alternative, as *Montoya* indicates, is done for evidentiary reasons. The evidence adduced at trial determines which of two or even more charges a defendant is actually convicted of. The elements of the charges vary and may or may not overlap. On the other hand, seeking a lesser included instruction occurs precisely because there is overlap between the elements of certain offenses. In fact, all the elements of the lesser offense are contained within the elements of the greater offense charged. That is the definition of a lesser included offense.

What has made this case difficult is that, on the surface, DWM appears as if it could be a lesser included offense of DUI. The first statutory element in both offenses is

virtually identical. The second element seems very similar. But it is not identical. As discussed above, the DWM statute makes it a violation of law *per se* to drive after illicit drug use whereas under the DUI statute there is no violation absent the incapacity to drive safely. DWM therefore is not a lesser included offense of DUI.

The State argues finally that DWM and DUI occupy the same relationship, as lesser and greater offenses, that theft and robbery do. Just as a theft, with additional facts, may become a robbery, so may a DWM escalate into a DUI. Br. Appellee 20. This argument fails, however, because element two of the DWM statute and element two of the DUI statute are not identical. In addition, the DWM statute injects something not found at all in the DUI statute, namely the phrase "metabolite." As the State correctly notes, a "metabolite" is a chemical by-product caused by the natural breakdown of a controlled substance in the body. Br. Appellee 18 fn.7. Assuming, for the sake of argument, that a controlled substance is a "drug," within the meaning of the DUI statute, there is nevertheless nothing to indicate that a "metabolite" is included definitionally. Section 41-6-44 refers merely to "alcohol" or "any drug." Had the legislature wished to include "metabolite" in the statute, it would have done so expressly, as in section 41-6-44.6.[2] Because DUI does not encompass having a metabolite in the body, DWM once

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[2]Arguably, the reason that the legislature did not include "metabolite" in the DUI statute is that if a person has a measurable amount of a metabolite in the body, without any measurable amount of the original controlled substance, he or she probably is not under the influence of the controlled substance to the point of impairment.

again cannot be a lesser included offense.

In sum, driving with any measurable controlled substance in the body is not a lesser included charge of driving under the influence. The jury instruction that the State asked for and received should not have been allowed. Trial counsel rendered constitutionally deficient performance in not objecting to the instruction. In the alternative, the trial court committed plain error in granting the State's request.[3]

II. There was no need for police to take a blood sample from Wallace without his consent. Further, it was taken without a valid search warrant, despite the State's arguments to the contrary.

The error that occurred when the jury received the lesser included instruction regarding driving with any measurable controlled substance in the body provides a sufficient basis, in itself, to reverse Wallace's convictions and grant him a new trial. Still, another basis for reversal and granting of a new trial is found in the circumstances surrounding the sampling of Wallace's blood by police, in particular the validity of the search warrant that police used.

But even assuming, for the moment, that the search warrant was valid, it is clear under Utah law that a motorist may refuse a chemical test, including a blood test, when

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[3]The State, in its brief, fails completely to address the second part of the *Strickland* ineffective assistance test, as well as the second and third parts of the *Dunn* plain error test, by arguing only that no error occurred when the trial court granted the lesser included jury instruction. *See* Br. Appellee 20-21 and fn.8.

arrested for suspected DWM or DUI. Police may request a test; the motorist however does not necessarily have to submit to it. Utah Code Ann. §§ 41-6-44.10 (1997) and 53-3-223 (1994); *State v. Cruz*, 446 P.2d 307, 309 (Utah 1968) ("an arrested person is compelled to elect whether he will submit to a chemical test"). There is, needless to say, a penalty for the motorist. Refusal to submit to testing may result in revocation of the person's license to operate a motor vehicle. *Id.*

Given this statutory framework, Wallace's blood testing lay outside the scope of search warrants in the first place.[4] Wallace of course does not claim that police never may obtain search warrants and proceed with chemical tests in certain types of criminal cases, including motor vehicle cases. Chemical testing seems appropriate in motor vehicle cases where there has been a felony violation or death or serious injury. He believes, however, that Utah law gives him the right, when merely suspected of being under the influence, of refusing testing and then suffering the consequence of possibly losing his driver's license.[5] If this is so, then police never possessed the right to obtain a sample of his blood, even with a warrant, and the evidence should not have come in against him at trial. Whether the warrant was valid or not is immaterial.

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[4]The State nowhere addresses this argument, which Wallace raised for the first time in his original brief. *See* Br. Appellant 17 fn.2.

[5]"[T]he purpose of such a law is to avoid the violence which often attends attempts to forcibly test recalcitrant drivers." *In the Interest of R.L.I.*, 739 P.2d 1123, 1127 (Utah Ct. App. 1987). In Wallace's case, the penalty that most likely would have been imposed was revocation, for an additional period of time, of his already suspended driver's license. Utah Code Ann. § 41-6-44.10(2)(h) (1997).

The State in any event argues that the warrant was valid, because, first, it was "precise and unambiguous." Br. Appellee 22. The typewritten, stock search warrant, in and of itself, may have been so. But it was accompanied by a typewritten, stock affidavit in support and a handwritten affidavit that were anything but precise and unambiguous. The stock affidavit requested a blood sample. This, however, was contradicted by amendment of paragraph 5, which then acknowledged that one of the reasons for blood sampling, refusal to submit to intoxilyzer testing, did not apply in Wallace's case. Request for a blood sample also was contradicted by the total strikeout of paragraph 6, stating that sampling is necessary because evidence of impairment dissipates rapidly in the bloodstream. The handwritten affidavit requested a urine sample. There was no request whatsoever for testing of blood. A common-sense reading of the warrant and two affidavits, in their entirety, does not lead inevitably to the conclusion that police wanted to sample Wallace's blood.

Secondly, the State argues that Officer Davis' amendment of the stock affidavit evidences the intent to seek a blood draw as opposed to a urine sample. "Had ... Davis sought a urine sample, it is reasonable to conclude that he would have altered the stock forms to reference a urine sample." Br. Appellee 24. This particular argument, however, cuts both ways. If Officer Davis truly had wanted blood testing, he would not have crossed out paragraph 6. Also, he would not have gone to the effort of supplementing the stock affidavit with his handwritten affidavit, in which he expressly requested a urine

sample and nothing else. In this same light, were the handwritten affidavit prepared solely for the purpose of establishing probable cause, as the State suggests, Br. Appellee 23, Davis had no need to specify any manner of chemical testing at all. His affidavit should have been silent about testing.

Finally, the State challenges Wallace's reading of *State v. Anderson*, 701 P.2d 1099 (Utah 1995). Br. Appellee 24-26. In fact, the State and Wallace interpret *Anderson* in the same manner, though perhaps with a slight difference in the shading of words. The case stands for the proposition that search warrants should be interpreted contextually, in light of supporting affidavits. What that means here is that the typewritten, stock search warrant, which the State wishes this Court to believe is "precise and unambiguous," is actually uncertain or at least equivocal in nature. When considered alongside the two affidavits, the warrant fails utterly to make clear that police wished to obtain a blood sample.

Bottom line, the search warrant that police used to sample Wallace's blood was not valid. It was facially deficient. It failed to describe with particularity the evidence to be seized. In the alternative, it authorized sampling of urine, not blood. This argument assumes that police had the right to obtain a blood sample from Wallace despite the fact that he elected not to submit to chemical testing and he never gave consent as section 41-6-44.10 allows. Wallace received ineffective assistance because defense counsel did not

vigorously pursue these matters.[6]

III. Police acted wholly outside the scope of their authority when they forced Wallace to submit to blood sampling. For that reason, Wallace was justified in resisting and assaulting Officer Ruble.

At issue is the scope of Wallace's right, if indeed he possessed the right, to forcibly resist police when they overpowered him and made him submit to blood testing on the jail cell floor. Wallace and the State both agree that the key case is *State v. Gardiner*, 814 P.2d 568 (Utah 1991). Wallace also agrees with the State that *Gardiner* is correct in interpreting Utah Code Ann. § 76-5-102.4 (1987) to mean that "[t]he only language in this section that could be construed as giving any sanction to a right to resist ... is the phrase 'and when the peace officer is acting within the scope of his authority as a peace officer.'" *Gardiner*, 814 P.2d at 574. A citizen is justified in resisting only if an officer is acting "wholly outside the scope of his authority." *Id.*

Wallace, however, disputes the State's claim that in assessing whether an officer is acting outside the scope of his or her authority, "the test" is whether the officer is doing what he or she is employed to do or is "engaging in a personal frolic of his [or her] own." Br. Appellee 27 (quoting *United States v. Heliczer*, 373 F.2d 241, 245 (2nd Cir. 1967).

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[6]The State has not responded to Wallace's ineffective assistance claim in its entirety, because it believes that blood sampling occurred pursuant to a valid warrant, any attempt to suppress the toxicology reports would have been futile, and therefore Wallace has not satisfied even the first part of the *Strickland* test.

Gardiner, at 575, quoted this passage from *Heliczer*. But the supreme court merely termed the passage "illustrative" with regard to interpreting the phase "scope of authority." The court did not formally adopt "engaging in a personal frolic" as the test to be applied in this jurisdiction. No bright line rule was announced, and the matter is not at all clear. Perhaps, if anything, the court gave some indication of adopting a totality of circumstances test for use in deciding whether police officers are acting within the scope of their authority. The unique facts and circumstances of the interaction between police and defendant were discussed in some detail in *Gardiner*. *Id.* at 575-76.

In addition, in its briefing, the State has made it appear that *Gardiner* held or asserted by way of dicta that an officer executing a search warrant is by definition not "engaging in a personal frolic." *See* Br. Appellee 28, ll. 9-11. *Gardiner* explicitly made no such announcement, either on the page cited or anywhere else in the opinion.

The application of *Gardiner* to this case is further complicated by important differences in the fact scenarios. As the supreme court observed in *Gardiner*, when this Court first considered the case, prior to grant of certiorari, it framed the salient issue as "whether a citizen has the right to forcibly resist *a peaceful search* ...." *Id.* at 570 (emphasis added). Police in *Gardiner* were in fact simply seeking peaceful admission into a loud party. *Id.* at 569. In this case, there was nothing peaceful about the actions of police. Wallace was told that he needed to submit to a blood draw (which, incidentally, is contrary to section 41-6-44.10(2)(a), requiring warning that refusal may

result in license revocation). Further, he was told, "we can do it the easy way or the hard way." T. 266. Police threatened Wallace with violence, and a violent interaction is exactly what occurred between them. Also, while *Gardiner* involved search of a building, the intrusion here was into the human body. The State attempts to minimize this particular difference by citing *Schmerber v. California*, 384 U.S. 757 (1966) and *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), and arguing that these cases sanction testing of Wallace's blood. Br. Appellee 28-29. The exact opposite is true. The cases do not support the State. As Wallace pointed out in his original brief, defendant in *Schmerber* was involved in an automobile accident with injuries to his passenger and therefore, under California law, he was subject to felony prosecution. Br. Appellant 21-22 fn.3. *Skinner* concerned itself with chemical testing of railroad workers following on-the-job accidents. Testing properly took place in these circumstances, which do not, however, exist in this case.[7]

Given a proper reading of *Gardiner*, as well as the important factual differences here, Wallace believes that it cannot be said that police were acting within the scope of their authority when they forcibly drew his blood against his will. Two reasons predominate. First, the warrant that police used was facially deficient. Secondly, and perhaps more significantly, police had no legal right to sample Wallace's blood without

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[7]Also, of course, the United States Supreme Court in *Schmerber* and *Skinner* was not called upon to interpret section 41-6-44.10, in particular the right given to motorists to refuse chemical testing coupled with the possibility of license revocation.

consent in the first place, given section 41-6-44.10. Regarding this second reason, Wallace hesitates to use the phrase "frolic." Nonetheless, if the word is understood broadly, something resembling a frolic occurred in the jail cell. Police acted totally outside the law. They engaged in a kind of schoolyard game with Wallace, to see if he would blink first. "The easy way or the hard way," they said. No thought was given about terminating this exchange, so that violence could have been avoided and the law might take its natural course, with Wallace most likely losing his driver's license for an additional period of time. The facts are extremely egregious in this case, much more so than in *Gardiner*, decided by a 3-2 vote of the supreme court.

Assuming that police acted wholly outside of the scope of their authority, Wallace was justified in resisting the blood draw and in the process assaulting Officer Ruble. Wallace received ineffective assistance when defense counsel failed to press this claim and also move to dismiss the assault charge for insufficiency of evidence.[8]

IV. Prior to trial, the State was required to give notice of its expert witnesses pursuant to Utah R. Crim. P. 16 and Utah R. Civ. P. 16 even if section 77-17-13 did not apply. Wallace was harmed by the State's failure to give notice.

From the outset, Wallace has acknowledged that the expert witness notice

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[8]The State does not deal with the ineffective assistance claim in its entirety, or the insufficiency of evidence argument, on grounds that police were acting within the scope of their authority when they drew Wallace's blood and therefore Wallace was not justified in resisting as he did. *See, e.g.,* Br. Appellee 28 fn.13.

requirement found in Utah Code Ann. § 77-17-13 (1994) may not apply in the facts of this case. Br. Appellant 27-28. How to interpret the statute is uncertain. The State may be correct in its interpretation, that is, that defense counsel was not entitled to notice because Wallace never was charged with any felony drug offense and the statute is not applicable to hybrid cases, with both misdemeanor and felony offenses, such as this one. Br. Appellee 31-21.

Wallace, however, argues alternatively that Utah R. Crim. P. 16 and Utah R. Civ. P. 16 required proper notification about the State's experts, even if section 77-17-13 did not. *See State v. Arellano*, 964 P.2d 1167, 1169 n.2 (Utah Ct. App. 1998). Br. Appellant 28. The State makes no attempt to rebut this argument in its brief.

Assuming that notice was required, the issue becomes whether Wallace was harmed by defense counsel's decision not to request continuance of the trial. As Wallace and the State both note, the trial court indicated that it was prepared to continue trial were it asked to do so. T. 302-03.

The State argues that Wallace bears the burden of demonstrating harm, under the second part of the *Strickland* test. Br. Appellee 34. Wallace continues to believe, however, that *State v. Arellano*, *supra*, liberalized *Strickland* and shifted to the State the burden of proving the absence of prejudice when defendants do not receive adequate notification of expert witness testimony before trial. As this Court has stated, "In *Arellano*, we recognized the difficult burden placed on defendants to establish prejudice

in cases such as these, and we shifted the burden of proving prejudice from the defendant to the State." *State v. Tolano*, 2001 UT App 37, ¶ 14, 19 P.3d 400. Further, the key question in *Arellano* and *Tolano*, as it is in this case, was whether defendants were harmed by continuation of trial when the State failed to provide proper notice regarding its experts. The fact that defendants' attorneys in *Arellano* and *Tolano* sought continuance, which the trial court denied, and defense counsel here never sought continuance, is irrelevant to the issue of harm. Likewise, it is irrelevant whether harm may have occurred through trial court error or ineffective assistance; the issue again is one of harm. The State asserts, unconvincingly, that such factual differences are important in resolving the point of law that Wallace raises. *See* Br. Appellee 35-36.

In this case, the State has completely failed to show how Wallace was not harmed by continuation of trial. The State claims that "counsel's efforts to discredit the toxiciologists' testimony was [sic] apparently successful in part" because Wallace was acquitted of DUI even though he was convicted of DWM. Br. Appellee 37. But a fair reading of the trial transcript indicates that Wallace was acquitted of DUI not because of defense counsel's cross-examination of the toxicologists but rather the State's inability to prove that Wallace was under the influence of drugs to the point of impairment when he was actually behind the wheel driving. Also, defense counsel's cross-examination of the toxicologists was predictable and perfunctory, based on past experience with the witnesses as opposed to all written materials pertaining to the case at hand, which

counsel did not have the opportunity to review beforehand because the State did not produce them.

In such circumstances, particularly where the State has not met its burden of proof, this Court should accept Wallace's explanation of harm. As this Court declared in *Tolano*, "In the present case, the State has not met its burden, and 'we are left to speculate as to what defendant could and would have done. Therefore, if any party should suffer from the uncertainty, it should be the party at fault. As such, we give defendant's explanation of prejudice ... the benefit of the doubt.'" *Id.* at ¶ 15 (quoting *Arellano*, 964 P.2d at 1171).

Defense counsel rendered deficient performance, and Wallace was harmed as well, when counsel neglected to move the trial court to continue trial because of the State's failure to give adequate notice regarding its expert witnesses.

V. The trial court should have continued trial because the relationship between Wallace and court-appointed counsel was irretrievably broken. The *Begishe* test is inapposite. Even so, continuation of trial would have been warranted in light of *Begishe*.

In his original brief, Wallace asserts that the trial court should have continued trial prior to jury selection and allowed him to obtain a new attorney because the relationship that he had with court-appointed counsel was irretrievably broken. Br. Appellant 35. The State, however, does not respond to this particular claim. Rather, it argues that the trial court was justified in not continuing trial given the four-part test enunciated in *State*

v. Begishe, 937 P.2d 527, 530 (Utah Ct. App. 1997). Br. Appellee 38-39, 42-44. Significantly, none of the *Begishe* factors involves the nature of the attorney-client relationship, in particular whether it satisfied Wallace's constitutional right to assistance of counsel.

Trial in this case should have been continued, regardless of *Begishe*. Wallace's relationship with counsel was irretrievably broken. In chambers, prior to trial, Wallace complained angrily that he was not receiving vigorous representation because counsel did not share his view that certain rights of his had been violated by the State. T. 5-6. Wallace and counsel had not been able to form a working relationship. Further, Wallace apparently was so upset with counsel that he felt that he could not talk meaningfully with him. There was little or no communication. Counsel himself essentially admitted that the relationship had broken down early on when he said, " ... I think it's just been–just been no real communication since I started representing him." T. 6-7. That Wallace left the courthouse after the in-chambers meeting, rather than allow himself to be represented by court-appointed counsel, is perhaps the best evidence of the failed attorney-client relationship that then existed.

In such circumstances, the trial court properly should have continued trial so that Wallace might obtain different counsel. This very much was a case where "the defendant's relationship with his or her appointed attorney has deteriorated to the point that sound discretion requires substitution or even to such an extent that his or her Sixth

Amendment right to counsel would be violated but for substitution." *State v. Pursifell*, 746 P.2d 270, 273 (Utah Ct. App. 1987); *accord State v. Lovell*, 1999 UT 40, ¶ 27, 984 P.2d 382 (citing *Pursifell*).

Importantly, when trial courts assess the attorney-client relationship for purposes of possibly appointing or otherwise allowing substitute counsel, emphasis should be placed on the nature of that relationship at the moment of inquiry as opposed to who did what over time and thus may be responsible for its possible breakdown. This is not to say that such matters never may be relevant to the question of substituting counsel. On the other hand, they are usually only minor or secondary considerations. The relationship between attorney and client is, in some ways, like a marriage. When attorneys and clients "divorce," metaphorically, and when men and women divorce, literally, the legal ground to be considered is one and the same, though it may be called "irretrievable breakdown" or "irreconcilable differences." That is, the question is: Is this relationship still viable or not? If not, the parties should be allowed to separate. And separation should take place regardless of who was "at fault."

In this case, the trial court and the State on appeal have spent an inordinate and inappropriate amount of time attempting to place blame on Wallace for the breakdown of the attorney-client relationship. That relationship, like a marriage, was the responsibility of both court-appointed counsel and Wallace. Arguably, if as counsel claimed Wallace was ignoring his attempts at communication, he should have notified the court of the fact

promptly and sought inquiry and appropriate action pursuant to *Pursifell*. Wallace should have appeared or if necessary been made to appear at a hearing. Wallace should have been appointed substitute counsel or, no later than a date certain, he should have been required to retain private counsel and give notice to the court. The matter should not have simmered then boiled over in the way that it did on the very morning of scheduled trial.

Thus, the *Begishe* test is inapposite to the issue at hand. Nonetheless, even if the test is applicable, continuation of trial would have been justified in light of the four factors set forth.

The first factor to be analyzed in *Begishe* is whether Wallace was diligent in his efforts to ready his defense prior to the date set for trial. Here, Wallace makes no false claims. In hindsight, he could have assisted defense counsel more diligently. Wallace adds, however, that he was only one party in a two party relationship. Had defense counsel notified the trial court about the breakdown of the attorney-client relationship, and had the court allowed Wallace to obtain new counsel, the same problems would not have existed in all probability and Wallace would have been fully prepared for trial.

The remaining three factors all support Wallace. It is likely that a continuance would have met the need for continuance. The State speculates, Br. Appellee 42, that Wallace did not have funds immediately available to retain private counsel. But this is pure speculation. Wallace was employed and earning money. T. 5-6. Presumably, he

could have made appropriate financial arrangements with an attorney. Even if, by a date certain, Wallace had not hired an attorney privately, the court was vested with authority to appoint him another legal defender. Next, any inconvenience to the trial court would have been minor. Indeed, the court indicated in the middle of trial that, if asked, it would grant a continuance so that the State could give adequate notice regarding its expert witnesses. The court's overriding concern, which to its credit it recognized, was Wallace's right to a fair trial. Finally, Wallace faced harm in the event that the trial were not continued. As counsel candidly admitted, "If [Wallace] were to get some attorney that he could cooperate with, he would probably be, maybe, better prepared than I am." T. 9. The State argues that Wallace actually was not harmed. Br. Appellee 43-44. In response, Wallace once again avers that he was and that the numerous issues presented on appeal demonstrate this fact conclusively. Wallace was correct when he said that counsel was not willing or prepared to defend his rights, some of which, it is clear, have constitutional significance.

Conclusion

All of Wallace's jury convictions should be reversed and Wallace should be granted a new trial because of one or more instances of ineffective assistance of counsel, in addition to cumulative error. In the alternative, reversal and a new trial should occur because the trial court did not conduct specific inquiry and then continue trial following Wallace's expressed dissatisfaction with appointed counsel.

At minimum, Wallace's conviction for driving with any measurable controlled substance in the body should be reversed because the trial court committed plain error in granting the State's request for a lesser included instruction on that charge. His conviction for assault against a police officer should be reversed because of insufficiency of evidence, in particular the inability of the State to demonstrate that Officer Ruble was acting within the scope of his authority when police drew Wallace's blood.

DATED this 15 day of January, 2002.

WESLEY M. BADEN
Attorney for Defendant and Appellant

Certificate of Mailing

On this 15 day of January, 2002 I mailed, by United States Post Office overnight Express Mail, the original and eight copies of this reply of the appellant to:

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and on this same day I mailed, via first class mail, two copies to:

Jeffrey S. Gray
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and one copy to:

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